

MAR 20 2006

NOT FOR PUBLICATION

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

V.

RUBEN SILVA-GONZALEZ,

Defendant - Appellant.

No. 05-50545

D.C. No. CR-04-02018-TJW

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
Thomas J. Whelan, District Judge, Presiding

Submitted March 7, 2006^{**}
Pasadena, California

Before: THOMAS and TALLMAN, Circuit Judges, and FITZGERALD^{***},
District Judge.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

^{***} The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

Ruben Silva-Gonzalez appeals his conviction for illegally entering the United States after having been deported in violation of 8 U.S.C. § 1326. We affirm. Because the parties are familiar with the factual history of this case, we do not recount it here.

I

Derivative citizenship is a defense to a charge of illegally entering the United States after having been deported. *United States v. Smith-Balither*, 424 F.3d 913, 922 (9th Cir. 2005). A defendant is entitled to present evidence in his defense. *Greene v. Lambert*, 288 F.3d 1081, 1090 (9th Cir. 2002). However, this right is not unlimited. *Id.* It is subject to reasonable restrictions “to accommodate other legitimate interests in the criminal trial process.” *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973))). Thus, a trial judge may exclude or limit evidence to prevent excessive consumption of time, undue prejudice, confusion of the issues, or misleading the jury. *Menendez v. Terhune*, 422 F.3d 1012, 1033 (9th Cir. 2005). The trial judge enjoys broad latitude in this regard, so long as the rulings are not arbitrary or disproportionate. *Id.*

Here, the defendant did not tender any affirmative evidence of derivative citizenship. Viewing the complete record in context, we cannot say that the trial judge abused his discretion in limiting cross-examination.

Because the record lacks evidence from which the jury could rationally have sustained the defense, the trial court did not err in denying a jury instruction on the defense. *See United States v. Jackson*, 726 F.2d 1466, 1468 (9th Cir. 1984).

II

The district court properly took judicial notice of Silva-Gonzalez's prior convictions because prior convictions do not have to be proven to a jury. *United States v. Booker*, 543 U.S. 220, 244 (2005); *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998). Unless and until the Supreme Court explicitly overrules *Almendarez-Torres*, it controls our analysis here. *See United States v. Velasquez-Reyes*, 427 F.3d 1227, 1229 (9th Cir. 2005). *Almendarez-Torres* also forecloses the argument that 8 U.S.C. § 1326 is unconstitutional.

AFFIRMED.